BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

MICHAEL SWEGER	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,057,357
PRO-KLEEN, INC.	)	
Respondent	)	
AND	)	
	)	
AMERICAN INTERSTATE INSURANCE CO.	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) requests review of the April 24, 2012 preliminary hearing Order entered by Administrative Law Judge Bruce E. Moore.

ISSUES

The Administrative Law Judge (ALJ) found that it is more probably true than not that claimant failed to wear, or properly attach his seatbelt. However, the ALJ was unable to conclude that claimant's failure to wear his seatbelt rose to the level of willful or reckless conduct sufficient to deny him compensation for his injuries. As a result of this finding, the ALJ determined claimant was entitled to medical care, with Dr. James Weimar continuing as claimant's authorized treating physician with the option of referring claimant for additional care. Respondent was also ordered to reinstate claimant's temporary total disability compensation (TTD), retroactive to the date those benefits were discontinued and to pay medical expenses, including mileage and prescriptions incurred to date.

The respondent requests review arguing that the ALJ's Order should be reversed as claimant willfully failed to use his seatbelt and recklessly violated respondent's workplace safety rules and regulations, which required the use of seatbelts.

Claimant contends that the ALJ's Order should be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Respondent admits claimant suffered injury on June 20, 2011, but denies the accident arose out of and in the course of claimant's employment.

Claimant testified that he has been a residential, commercial and industrial painter all of his life, and that he was hired by respondent to do industrial painting. Claimant's job was to paint big tanks, staircases, railings and things of that nature. While painting, claimant would wear a painter suit, gloves, face shield, hard hat and safety glasses.

Claimant began working for respondent at the beginning of June 2011. On June 20, 2011, claimant arrived to work at 6:15 a.m.. He helped Zeb Harrington, the foreman load stuff on a truck and was to follow Zeb to a site to drop off a truck. Claimant testified that when he got into the truck he was to drive he put his seatbelt on. On the way to the job site claimant and Mr. Harrington stopped at the Quick Trip to get gas. Claimant got out and filled the tank and then got back in the truck, putting his seatbelt back on. They then continued toward their destination, stopping again at Emprise Bank to try and cash their per diem checks. Claimant again got out of his truck and got into Mr. Harrington's truck to go through the drive thru of the bank. After the bank would not cash the checks, claimant got back into his truck, put his seatbelt back on and the two continued toward their destination.

Claimant testified that as he was following his supervisor, Zeb Harrington, to the job site the wind was blowing at 61 miles an hour out of the south. The wind blew his truck off the side of the road. Claimant couldn't keep the truck steady and it rolled to the other side of the road into a ditch. Claimant could not remember anything about the accident once the truck started rolling. Claimant was told that he was ejected out of the passenger window as the truck rolled. Claimant believes he was ejected from the passenger window as it was the only broken window in the truck.[1]

Claimant hit his head pretty hard and doesn't remember much about the accident. He was told that he was thrown 20 feet from the truck through some barbed wire into an open field and rags had to be used to stop the blood gushing from his head. Claimant had several lacerations from crawling out of the barbed wire. He doesn't recall his pants being down around his knees and him having to pull them up as Zeb Harrington stated.[2]

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[1] Claimant's Depo. at 13.

[2] Claimant's Depo. at 14.

Claimant contends that he was wearing his seatbelt that day and doesn't know how he went through the window because the seatbelt was latched. He testified:

> I don't know whether the seatbelt was safe or what. All I know is I had it on. I mean, whether it could have broke, all I know is the cab of the truck was destroyed. I mean, that's all I know. I mean, I did have my seatbelt on, sir.[3]

Claimant suffered a split in his head, lacerations on his left arm and right leg and a broken back in the accident. He received treatment, including surgery with board certified neurological surgeon James D. Weimer, M.D., PhD. who performed a T11-L1 fusion of claimant's spine. Claimant developed an infection as a result of the surgery and required additional treatment. Claimant denies any prior injuries to his mid-back area.

Claimant testified that the last thing he remembers about that day is his truck being blown off the pavement with him trying to correct his steering to get it back straight and the truck heading for a ditch. As far as claimant remembers he had his seatbelt on at the time. Claimant testified that the next thing he remembered was EMS putting him on a flat board with a neck brace and his being taken to the ER at Pratt hospital. He was then transported to Wesley Medical Center in Wichita.

At Wesley Medical Center, claimant received treatment with Dr. Weimar, from June 20, 2011 through August of 2011. The workers compensation carrier paid for that treatment. Around the first of September 2011 claimant was informed that his claim for workers compensation benefits was being denied.[4]

Claimant is currently under that care of Dr. Khan, an infectious disease physician, due to complications from surgery. Claimant continues to have back problems and headaches. Claimant testified that Dr. Weimar wants to refer him to a physical medicine doctor, but claimant has no insurance and no other way to pay for the recommended treatment. Claimant has had no income since early September 2011 when his TTD was cut off.

Christiana Rector, claimant's sister, testified that on June 20, 2011, she was contacted around 11:00 a.m., and advised that her brother had been involved in an accident. Ms. Rector and her father James Sweger went to Wesley Medical Center and first saw claimant at 4:00 p.m. Ms. Rector testified that around 6:00 p.m. a representative for Pro-Kleen came to the hospital and spoke with claimant. The gentlemen, Mr. Ash, asked the claimant how he was doing and asked if he had been wearing his seatbelt at the time of the accident. Claimant responded that he was wearing his seatbelt at the time. Mr.

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[3] Claimant's Depo. at 17.

[4] P.H. Trans. (March 15, 2012) at 28.

Ash had no other questions for claimant that day and told him he would be back the next day.[5]

Claimant testified that he had two previous workers compensation claims in 2009 with Koehn Painting for injuries to his right rib area and the back of his head. Those claims were settled on December 9, 2009. Claimant was laid off from Koehn Painting and was receiving unemployment compensation before going to work for respondent.

Claimant admits to signing the acknowledgment page of the employee handbook, but doesn't admit to knowing everything in it as he was not given the chance to review everything in it at the time of his hiring.

Zebulon Crider Harrington, III, testified that he has been a project foreman for respondent for almost 7 years. He testified that he worked with the claimant for over 20 years at another company before claimant came to work for respondent.

On June 20, 2011, Mr. Harrington, III, claimant and Andre Samilton were headed toward Oklahoma. Mr. Harrington, III, testified that he was in a 14-foot box trailer truck with Mr. Samilton and claimant was following in another truck by himself. He testified that claimant was driving a sandblast rig, which is a two and a half ton truck.

Mr. Harrington, III testified that he noticed in the rearview mirror of his truck that claimant's truck had drifted off the side of the road and then flipped over as it made its way back onto the road, so he immediately found a spot to turn around and called Randy Korthals, the project manager to report the accident. He also called 911 and headed back to check on claimant.

When Mr. Harrington, III and Mr. Samilton arrived at the scene, claimant was down on all fours in the grass on the other side of a barbed wire fence. He had a cut on his head and his pants were down around his knees.[6] He doesn't recall what claimant said to him before they helped him to his feet and through the barbed wire and into the other truck. Mr. Harrington, III testified that claimant's truck was still running and he went to reach in to turn it off, but did not turn off the truck at this time as he decided it would not be a good idea. However, as he leaned in he noticed that the seatbelt was not latched. Mr. Harrington, III got claimant in his truck and proceeded to drive him to the hospital in Pratt. On the way, claimant began to have trouble breathing and Mr. Harrington, III pulled over and called an ambulance.

Claimant was taken via ambulance to the hospital and Mr. Harrington, III went back to the accident scene to help with the cleanup. The sheriff got pictures of the accident and

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[5] P.H. Trans. (March 15, 2012) at 42-43.

[6] Harrington, III Depo. (Oct. 13, 2011) at 13.

the tow truck hauled the wrecked truck off. Mr. Harrington, III testified that the pictures taken at the accident scene were an accurate depiction of what he observed.

Mr. Harrington, III testified that prior to the morning of June 20, 2011, claimant had satisfactorily performed his job. This was not the first time that claimant had followed him in another truck to a job. Mr. Harrington, III testified that he could see claimant's truck in his rearview mirror and witnessed the accident, but he couldn't tell how far back claimant was. He did not see the claimant ejected from the truck.

Mr. Harrington, III was deposed again on April 12, 2012, at which time he testified that during his employment with respondent he had on occasion, prior to June 20, 2011, been in trucks by himself and with others.

He acknowledged that on June 20, 2011, the two truck caravan made a couple of stops between the time they left the shop and the time of the accident. Mr. Harrington, III testified that he had an occasion to get out of his truck at those stops and spoke with the claimant. He did not notice anything unusual.

Mr. Harrington, III testified that when he looked into the cab of claimant's truck at the accident scene, he did not see any blood. But since the truck was on its side he couldn't see the top of the truck without crawling inside. He also testified that some of the windows were knocked out, but he couldn't recall which ones. Other than that he really didn't inspect claimant's truck that closely after the accident.

Mr. Harrington, III testified that there have been times when people have forgotten to put their seatbelts on when they got in the truck, but as soon as they noticed they didn't have it on they put it on.

Steven Ash, safety manager for respondent, testified new hires participate in a four hour orientation conducted by him at which time there would be a review of the company's health and safety policies in the employee manual. In the manual there is a section specifically covering safety while driving company vehicles. Mr. Ash testified that there is actually a separate manual for driving safety procedures. The policy is that drivers and passengers are required to wear seatbelts at all time and drivers are responsible for ensuring the passengers wear their seatbelts.

Mr. Ash testified that on the day claimant had his orientation, claimant was the only attendee and the session was conducted in his office.[7]

Mr. Ash was notified of claimant's accident through a phone call from Randy Korthals. An accident reported was filled out and an investigation was conducted. Mr. Ash

[7] Ash Depo. at 31.

testified that he took pictures of the wrecked truck after the accident after it had been towed to the salvage yard in Pratt. Several weeks after the accident, Mr. Ash also took some video of the inside of the truck. In the video, Mr. Ash demonstrated that the seatbelt was working properly by hooking and unhooking it twice. He determined that when the belt was latched it stayed secure until he unlatched it. He observed no malfunctions.

Mr. Ash testified that in his 11 years of experience volunteering with the Butler County Rescue Squad, he has not encountered an accident where anyone wearing a seatbelt had been ejected from the vehicle.[8]

In the course of his investigation, Mr. Ash interviewed claimant in the ICU at Wesley Hospital with claimant's sister and father present, and claimant stated that he was not wearing his seatbelt at the time of the accident.[9]

Claimant met with Dr. James Weimar, a neurosurgeon, who determined that there was no medical basis to provide an opinion regarding whether claimant's use of or non-use of a seatbelt had any contribution in causing the particular type of compression fracture claimant had at T12.[10]

> Q. . . . . First of all, in the course of your practice and in the course of treating patients who have been involved in rollover type accidents, have you noticed such patients exhibiting certain types of injuries if they have been wearing a seatbelt?
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> A. I am not exactly sure I completely understand your question.
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> Q. For instance, in this case, if Mr. Sweger had been wearing a seatbelt at the time of the accident, would it have been more probable than not that he would have suffered bruising, swelling and/or abrasions in the area of the shoulder harness down to his waist and around the waist where the lap belt would have impacted his body?
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> A. I would say more typically if someone has been wearing their seatbelt in this type of accident we would see a seatbelt injury of some kind.
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> Q. The type of injuries, if you will, that I just described, abrasions, bruising, swelling in the areas where the seatbelt would have touched the person's body, is that where you would have seen such injuries?
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> A. Most likely.

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[8] Ash Depo. at 20.

[9] Ash Depo. at 34-35.

[10] Weimar Depo., Ex. 2 at 1 (Dr. Weimar's Feb. 28, 2012 letter).

> Q. When you were reviewing the Pratt County EMS records, did you observe or did they observe and report Mr. Sweger having suffered any bruising, swelling and/or abrasions in the area where the seatbelt would have impacted his body?
>
> . . .
>
> A. I did not see any record of that in the documentation that I reviewed.
>
> Q. Did you, in your review of the Wesley ER records, note whether the Wesley healthcare providers had documented that Mr. Sweger was suffering from any bruising, swelling and/or abrasions in the area where the seatbelt would have impacted his body?
>
> . . .
>
> A. I did not notice that in the record, no.
>
> Q. Can you state within a reasonable degree of medical probability that had Mr. Sweger been wearing a seatbelt and been involved in this violent rollover accident it is more probable than not that he would have exhibited these types of seatbelt injuries?
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> A. I think it is more probable than not that he would have had some kind of visible signs of bruising.
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> Q. When you treated him early on, initially, did you have a chance to observe what injuries he was suffering from?
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> A. . . . . I did not notice whether or not he exhibited any signs of seatbelt injury, but I wasn't looking for it.[11]

He opined that claimant's cuts and lacerations were consistent with being ejected from a vehicle and thrown through barbed wire. Claimant could have suffered the injury to T12 whether he had a seatbelt or not.[12] But it is more likely that he wouldn't have suffered the fracture if he had his seatbelt on.[13]

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[11] Weimar Depo. at 11-13.

[12] Weimar Depo. at 20-21.

[13] Weimar Depo. at 23.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 2011 Supp. 44-501b(a)(b)(c) states:

> (a) It is the intent of the legislature that the workers compensation act shall be liberally construed only for the purpose of bringing employers and employees within the provisions of the act. The provisions of the workers compensation act shall be applied impartially to both employers and employees in cases arising thereunder.
> (b) If in any employment to which the workers compensation act applies, an employee suffers personal injury by accident, repetitive trauma or occupational disease arising out of and in the course of employment, the employer shall be liable to pay compensation to the employee in accordance with and subject to the provisions of the workers compensation act.
> (c) The burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends. In determining whether the claimant has satisfied this burden of proof, the trier of fact shall consider the whole record.

K.S.A. 2011 Supp. 44-501(a)(1)(B)(C)(D) states:

> (a) (1) Compensation for an injury shall be disallowed if such injury to the employee results from:
> (A) The employee's deliberate intention to cause such injury;
> (B) the employee's willful failure to use a guard or protection against accident or injury which is required pursuant to any statute and provided for the employee;
> (C) the employee's willful failure to use a reasonable and proper guard and protection voluntarily furnished the employee by the employer;
> (D) the employee's reckless violation of their employer's workplace safety rules or regulations;

The ALJ, in the Preliminary Hearing Order, sets out findings of fact, analysis and conclusions of law in significant detail and it is not necessary to repeat those herein. This Board Member adopts those findings, analysis and conclusions as written. As noted in the Order, it is inconclusive whether claimant was or was not wearing his seatbelt at the time of the accident. Claimant testified that he was. But, respondent's evidence indicates that the seatbelt was functioning properly and appeared at the time of the accident to be unlatched. This Board Member finds that it is more probably true than not that claimant had failed to wear or properly attach his seat belt prior to the accident. If claimant were wearing his seatbelt at the time of the accident, then respondent's defenses would fail.

However, even if claimant had failed to put on his seatbelt, it must be shown that claimant willfully failed to use the guard or protection and/or recklessly violated the safety rules of respondent.

As noted in the Order, neither "willful" nor " reckless" were defined by the Kansas legislature. However, the Kansas appellate courts have defined "willful" as requiring more

than an intentional act, such as proof of "intractableness, the headstrong disposition to act by the rule of contradiction."[14]

This record does not support a finding that claimant's actions were "willful" and/or "reckless". Therefore, the finding by the ALJ that respondent has failed in it's burden of proving the required intent behind claimant's actions is affirmed. The award of benefits is also affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.[15] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

If claimant had been wearing his seatbelt at the time of the accident, then respondent's defenses under K.S.A. 2011 Supp. 44-501(a)(1) would fail. However, even though it has been found, for preliminary hearing purposes, that claimant had failed to wear or properly attach his seatbelt, respondent has failed to prove that claimant's failure to wear his seatbelt was "willful" and/or "reckless". Thus, respondent's defenses under K.S.A. 2011 Supp. 44-501(a)(1) also fail. Under either scenario, respondent has failed to prove the elements necessary to deny claimant benefits herein. Therefore, for preliminary purposes, the award of benefits is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Bruce E. Moore dated April 24, 2012, is affirmed.

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[14] *Carter v. Koch Engineering*, 12 Kan. App. 2d 74, 735 P.2d 247, *rev. denied* 241 Kan. 838 (1987); citing *Bersch v. Morris & Co.*, 106 Kan. 800, 804 189 Pac. 934 (1920).

[15] K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of June, 2012.

_____
HONORABLE GARY M. KORTE
BOARD MEMBER

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Bruce E. Moore, Administrative Law Judge